

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEPHAN D. MASON,	§	
	§	No. 468, 2005
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court of the
	§	State of Delaware in and for
	§	New Castle County
	§	
v.	§	
	§	
STATE OF DELAWARE,	§	Cr.I.D. No. 0402002963
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: May 18, 2006

Decided: July 19, 2006

Before **STEELE**, Chief Justice, **BERGER** and **RIDGELY**, Justices.

**ORDER**

This 19<sup>th</sup> day of July 2006, upon consideration of the briefs of the parties, it appears to the Court that:

(1) The defendant-appellant, Stephan D. Mason, appeals his convictions by a Superior Court jury of two counts of robbery first degree, two counts of possession of firearm during the commission of a felony, wearing a disguise during the commission of a felony and conspiracy second degree. Mason claims the trial judge erred when he denied his request for a missing evidence instruction to the jury. We find no reversible error and affirm.

(2) On February 2, 2004 two men robbed the Cutrona Liquor Store where Navin and Ashok Patel were working. When the robbers left the store, Patel got in his car and drove to the rear of the store where he witnessed the two men enter a dark-colored, two-door Lexus sedan through both doors. Patel recorded the license plate number and reported it to the police along with a description of the car. Two days later, police stopped Mason in the same Lexus which was registered in his name. Mason told the police he had the only keys to the vehicle and that he had not loaned the car to anyone on February 2, 2004, the day of the robbery.

(3) Detective Spillan and an evidence technician searched and photographed the vehicle. Mason contended at trial that Patel's description of what happened could not be right because the driver's side door could only be opened from the inside of the car. Anthony Watts testified for the defense that the driver's side door would only open from the inside.

(4) Mason requested the trial judge to give a *Lolly*<sup>1</sup> or missing evidence instruction to the jury. The State claimed that the police released the car to Mason, but Mason argued that he never received his car. After finding that the State was not clearly negligent that and there was undisputed testimony that the door could open from the inside, the trial judge denied Mason's request.

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<sup>1</sup> See *Lolly v. State*, 611 A.2d 956 (Del. 1992).

(5) Mason claims that the trial judge erred because the police failed to preserve his automobile, evidence that was material to his innocence. This Court reviews the Superior Court’s denial of a request for a jury instruction on missing evidence *de novo*.<sup>2</sup>

(6) Mason contends his car would tend to discredit Patel’s testimony and corroborate the testimony of Watts. Mason argues that the police had a duty to preserve his car, and they materially breached their duty causing undue prejudice to the Mason. The State responds that Watt’s testimony regarding operation of the car door was undisputed and there was ample evidence to support Mason’s conviction. Furthermore, even if the car door could only be opened as Watts testified, Mason could have left it ajar or left the window open in order to reach inside and open it.

(7) We have recognized that “there may be circumstances when the State failed to preserve evidence that was material to the defense and the defendant would be entitled to a missing evidence instruction.”<sup>3</sup> Generally, the analysis involves six questions:

1. Would the requested material, if extant in the possession of the State at the time of the defense request, have been subject to disclosure under Criminal Rule 16 or *Brady*?

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<sup>2</sup> *Hendricks v. State*, 871 A.2d 1118, 1123 (Del. 2005). *Lolly v. State*, 611 A.2d 956 (Del. 1992); *Hammond v. State*, 569 A.2d 81 (Del. 1989); *Deberry v. State*, 457 A.2d 744 (Del. 1983).

<sup>3</sup> *Hendricks v. State*, 871 A.2d 1118, 1124 (citing *Lolly*) (footnote omitted) (emphasis omitted).

2. If so, did the government have a duty to preserve the material?
3. If there was a duty to preserve, was the duty breached, and what consequences should flow from breach?<sup>4</sup>

If law enforcement's duty to preserve evidence is breached, the second stage of the analysis examines:

1. the degree of negligence or bad faith involved,
2. the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available, and
3. the sufficiency of the other evidence produced at trial to sustain the conviction.<sup>5</sup>

(8) We have also recognized that even if evidence should have been preserved, the failure to do so may be harmless error.<sup>6</sup> In this case, even if the police breached the duty to preserve the car, the defense had direct testimony to support its claim that the driver's side door opened only from the inside. Mason admitted to the police that he was the only person with keys to his car and that he did not loan the car to anyone on the date of the robbery. Even if the Superior Court erred when it denied Mason's request for a missing evidence instruction, we conclude that any error was harmless beyond a reasonable doubt.<sup>7</sup>

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<sup>4</sup> *Id.* (citing *Deberry v. State*, 457 A.2d 744 (Del. 1983)).

<sup>5</sup> *Id.* (citing *Hammond v. State*, 569 A.2d 81 (Del. 1989)) (footnote omitted).

<sup>6</sup> *Hammond v. State*, 569 A.2d 81, 91 (Del. 1989).

<sup>7</sup> *Id.*

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/Henry duPont Ridgely  
Justice